IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,
Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES SIMANTS, INTERVENOR, AND THE STATE OF NEBRASKA, INTERVENOR,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

BRIEF OF PETITIONERS

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

JAMES L. KOLEY
STEPHEN T. MCGILL
MCGILL, KOLEY & PARSONAGE, P.C.
Suite 300
10010 Regency Circle
Omaha, Nebraska 68114

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,
Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES SIMANTS, INTERVENOR, AND THE STATE OF NEBRASKA, INTERVENOR,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Nebraska

BRIEF OF PETITIONERS

OPINIONS AND ORDERS BELOW

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated

October 27, 1975, are set forth at pages 1a and 9a of the Appendix to the Amended Petition for a Writ of Certiorari (hereinafter "Cert A"). The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975, is set forth at Cert A 19a. The opinion of Mr. Justice Blackmun dated November 13, 1975, appears at Cert A 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975, appears at Cert A 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975, is set forth at Cert A 35a. The majority, concurring and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975, are set forth at Cert A 44a and are reported at 63 Neb. S.C.J. 783, —— N.W. 2d ——. The Orders of this Court, dated December 8, 1975, and December 12, 1975, which, *inter alia*, granted the motion of Petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and which granted said Petition are set forth at Cert A 70a and 71a. Except as indicated above, none of said opinions is thus far reported.

JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970).

QUESTIONS PRESENTED

1. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the press of information revealed in public court proceedings, in public court records, and from other sources about pending judicial proceedings.

2. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the publication by the press of information which does not relate to national security and which could not surely result in direct, immediate and irreparable injury to the nation or its people.

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, the injunction of the Nebraska Supreme Court dated December 1, 1975, prohibiting publication by the Petitioners can be sustained as a matter of fact and law on this record.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech or of the press * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

(a) Matters Leading to the Grant of Certiorari

Petitioners in this case are Nebraska newspaper publishers, broadcasters, journalists and media associations, and national newswire services that report from and to Nebraska. Petitioners are engaged primarily in the business of gathering, reporting, publishing and broadcasting local, national and international news, as well as other matters of interest, to their readers, listeners and general public. Petitioners were ordered in a series of decisions of the County Court in and for Lincoln County, Nebraska, the District Court in and for Lincoln County, Nebraska, and the Supreme Court of the State of Nebraska to refrain from publishing a broad spectrum of information, much of which was and is a matter of public record, related to a case now pending in Nebraska entitled *State* v. *Simants*. The factual background relating to these orders is, in brief, as follows:

On or about October 18, 1975, six members of the Henry Kellie family were allegedly murdered in the Kellie home in Sutherland, Nebraska. The community was immediately alerted by a break-in news announcement on television. The police requested residents to stay off the streets and to use caution about persons trying to enter their homes. A dance was closed, several bars were shut down, at least one entire family left town, and rumors spread that a sniper was loose in Sutherland and that the authorities had been ordered to shoot on sight (Joint Appendix—hereinafter "JA" —84). Authorities said that most people with guns had them loaded (JA 83, 84).

The next day, October 19, 1975, Erwin Charles Simants was arrested by the Lincoln County Sheriff and charged with six counts of murder in the first degree in a complaint filed in the County Court of Lincoln County, Nebraska (JA 4). News of Simants' arrest was immediately broadcast over radio and television and reported in the press. As one press report put it, "News of the capture of the suspected killer early Sunday morning relieved the tension of the long night for the community residents and law officers" (JA 83).

An arraignment hearing was held before the County Court on the same day as the arrest, and several journalists were in attendance. At the request of the County Attorney, one portion of the hearing was conducted openly, and another was closed by the court to the press and the public.[1]

On October 20, the Lincoln County Attorney told the press that Simants had given authorities "a statement" (JA 88), and the next day, October 21, he further told the press that he had a theory as to motive which might be confirmed by a still-uncompleted autopsy report (JA 85, 91, 92).

At about 7 PM on the evening of October 21—the day before a scheduled preliminary hearing[2]—the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court against the press. The entire motion, which was

---

[1] See Affidavit of Kiley Armstrong dated October 31, 1975, ¶ 2, which appears at JA 13 and which is hereinafter cited as "Armstrong Affidavit."

[2] The purpose of the preliminary hearing was to determine whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges against him.

unaccompanied by any affidavits, exhibits or other supporting material, read as follows:

> The State of Nebraska hereby represents unto the Court that *by reason of the nature of the above-captioned case*, there has been, and no doubt there will continue to be, mass coverage by news media not only locally but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a.m. on October 22, 1975; and there is *a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury* and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public.
>
> WHEREFORE, the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply. [JA 8; emphasis added.]

At about 7:30 PM that same evening, argument was made to the court on the prosecution's motion. The defense joined in the prosecution's request, again without even an offer of supporting evidence, and also moved that the preliminary hearing be closed to the public and the press. No evidentiary hearing was held; no testimony was taken or exhibits filed; no evidence of any kind was introduced.[3] The request for a closed

[3] See the testimony of the County Judge, Judge Ruff, in transcript of Bill of Exceptions before the District Judge, Judge Stuart (one of the Respondents here) on October 23, 1975 (JA 60, 64-65). To the same effect, see the testimony of Mrs. Dorothy Kritz, Associate Judge and Clerk of the Lincoln County Court, who was present at the prior restraint hearing on October 21, 1975, and whose statement appears in the same Bill of Exceptions (JA 40-41, 43-44, 50).

preliminary hearing was denied by the County Court that same evening.

On October 22, prior to the preliminary hearing but after the results of the autopsy were made known to the County Attorney, he filed an amended complaint charging that all six murders in the first degree had been committed in conjunction with the perpetration or attempt to perpetrate one or more sexual assaults (JA 19, 87). On that same day, also prior to the preliminary hearing, the County Court entered a prior restraint order[4] which found that there was "a *reasonable likelihood* of prejudicial publicity which would make difficult, if not impossible, the impaneling of an impartial jury in the event the defendant is bound over to the District Court for trial * * *" (Cert A 1a; emphasis added). The County Court proceeded to impose broad restrictions on all attorneys, parties, witnesses, court personnel and other persons "present in court" during the preliminary hearing, prohibiting them from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." The County Court also ordered that "no news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal

[4] The entire order appears in Cert A 1a. See also the Armstrong Affidavit, JA 13-14. The order was rendered orally to the press on October 21 and signed in written form on October 22 (JA 54).

Litigation" (Cert A 2a). (These Guidelines appear in Cert A 4a, 13a).[5]

An open preliminary hearing was held on October 22, at which time testimony was taken from various witnesses which disclosed significant factual information concerning the alleged crimes.[6]

On October 23, Petitioners filed an application with the District Court of Lincoln County, Nebraska, for leave to intervene in the case and for vacation of the County Court's prior restraint order. Counsel for the defendant, again without supporting documentation, moved for continuation of the County Court's order and that all future pre-trial proceedings in the Simants case be closed. The District Court thereupon held an "evidentiary hearing," purportedly restricted to the issues raised by Petitioners and the defendant (JA 52-53). The Clerk of the County Court testified briefly, identifying docket entries and other files in the Simants case and describing the events on the evening of October 21 before the County Court (JA 36-52). The County Judge, Judge Ruff, then took the stand

[5] Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any reference without comment to, public records or communications theretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence, and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order (Cert A 2a-3a).

[6] See Armstrong Affidavit, JA 14-16.

and was shown fourteen news articles which were marked as Exhibits 4A-N for identification. Two of the exhibits, 4B and 4M, turned out to be the same articles (JA 63). Of the remaining articles, Judge Ruff testified that prior to the entry of his prior restraint order, he had seen or been aware of only three—Exhibits 4C, 4K and 4M (the same as 4B)—although he might also have seen Exhibit 4J (JA 59-64). He admitted that Exhibit 4D, an announcement of the Kellie family funeral services, not only was never relied upon but really had "nothing to do with the case" (JA 62). All of these exhibits were admitted in evidence (JA 64).

Judge Ruff said that he had relied, in entering his order, partly on the three or four articles he had read, that he was aware that the Simants case was attracting national attention from members of the press, that he had spoken to members of his own court about the matter, and that he was generally aware of radio and television publicity (JA 57-60, 64). He was no more specific than that, and he concluded that "the main criteria" he had used was "[c]onversation around the courthouse" (JA 64). Counsel for Petitioners asked:

> Q And, as I understand it, there was absolutely no evidence offered at the [October 21 prior restraint] hearing.
>
> A [Judge Ruff] At the hearing, that's right.
>
> Q And you based your findings in your order solely upon what you had read in the newspapers, and what you had seen on TV, and what you had heard on the radio and statements of counsel.
>
> A Primarily statements of counsel.

Q Which were not of record.

A Which were not of record, that's correct. [JA 65.]

The District Court thereupon granted Petitioners' motion to intervene, denied defense counsel's motion to close any future pretrial District Court proceedings, and adopted as its own on an interim basis the County Court's restrictive order.

On October 27, without a further hearing and without the introduction of further evidence of any kind, Judge Stuart terminated the County Court's order and substituted his own, which he read in open court before the press and the public (JA 17, 73-76). Judge Stuart found "*because of the nature of the crimes charged* in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial" (Cert. A 9a; emphasis added). The court cited no source and no evidence for this conclusion. It did not refer, for example, to Judge Ruff's testimony or to the news articles previously introduced in evidence. Instead, the court appeared to rely entirely upon "the nature of the crimes charged."

The court adopted the aforementioned Nebraska Bar-Press Guidelines as "clarified" by the court in its order. The District Court held as follows:

> 1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pre-trial" publicity.[7]

[7] As pointed out *infra*, the order, despite its designation by the court, not only was a "pre-trial" order but also was an order enforced after commencement of the trial.

> 2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.
>
> 3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.
>
> 4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.
>
> 5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assauited or the details of any alleged assault by the defendant will not be reported.
>
> 6. The exact nature of the limitations of publicity as entered by this order will not be reported.[8] That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against

[8] This provision was inserted even though, as noted *supra*, the court had already read the entire order, including its references to a confession, statements against interest and sexual assaults, in open court before the press and the public (JA 17, 73-76).

> interest, witnesses or type of evidence to which this order will apply will not be reported. [Cert A 10a-11a.[9]]

On October 31, Petitioners sought relief from the District Court's order after having abided by the various orders of both the County and District Courts for nine days. Petitioners sought a stay from the District Court of its order and at the same time sought from the Supreme Court of Nebraska immediate relief, by way of mandamus, stay, and/or expedited appeal, from the District Court's order (JA 99-116). Upon the failure of both the District Court and the Supreme Court of Nebraska to act on the requested relief, Petitioners filed an application on November 5 with this Court (directed to Mr. Justice Blackmun, as Circuit Justice) which sought a stay of the District Court's order. In response to the November 5 application by the Petitioners and in order to avoid exercising what it considered to be "parallel jurisdiction" with this Court, the Supreme Court of Nebraska issued a *per curiam* memorandum on November 10 in which that court declined to take any action on the Petitioners' writ of mandamus pending before it until such time as this Court made known whether it would accept jurisdiction in the matter (Cert A 19a).

On November 13, Mr. Justice Blackmun, acting in his capacity as Circuit Justice, issued an In Chambers opinion in which he declined to act finally on the Petitioners' application for a stay of the District Court's order "[o]n the expectation, which I think is now clear and appropriate for me to have, that the Supreme

[9] That part of the District Court's order relating to the physical accommodations to be accorded the press in the courtroom was not contested by Petitioners and is not now contested.

Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that 'time is of the essence'" (Cert. A 21a, 28a). In so ruling, Mr. Justice Blackmun noted that "if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1, * * * a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the petitioners possess and may properly assert. Under these circumstances, I would not hesitate promptly to act" (Cert A 27a). Mr. Justice Blackmun reserved the right to Petitioners "to reapply to me should prompt action not be forthcoming" (Cert A 28a).

On November 18, the Supreme Court of Nebraska set November 25 as the date on which it would hear Petitioners' arguments on their request for mandamus and on the substantive questions surrounding the constitutional validity of the District Court's order (Cert A 29a). Also on November 18, Petitioners, pursuant to the November 13 ruling of Mr. Justice Blackmun, renewed their application for a stay.

On November 20, Mr. Justice Blackmun granted Petitioners a partial stay of the District Court's order after concluding that the Supreme Court of Nebraska's delay in rendering a definitive decision exceeded "tolerable limits" (Cert A, 35a, 36a). As Mr. Justice Blackmun observed in his In Chambers opinion:

> * * * [E]ach passing day may constitute a separate and cognizable infringement of the First

> Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. [Cert A 37a.]

In granting a partial stay, Mr. Justice Blackmun made, *inter alia*, the following rulings:

(1) That portion of the District Court's order which generally incorporated the aforementioned Nebraska Bar-Press Guidelines was stayed by reason of the fact that the Guidelines

> are merely suggestive and accordingly, are necessarily vague. * * * I find them on the whole * * * sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of "guidelines"—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order. [Cert A 38a-39a.]

(2) Paragraphs 4 and 5 of the District Court's order were stayed by Mr. Justice Blackmun since:

> No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of

> the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. * * * These facts in themselves do not implicate a particular putative defendant. * * * [U]ntil the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order. * * * [Cert A 39a-40a.]

(3) The restraints in the District Court's order on other aspects of pretrial publicity were not prohibited by Mr. Justice Blackmun, "at least on an application for a stay and at this distance * * *" (Cert A 40a). Observing that "[r]estrictions limited to pretrial publicity may delay media coverage" but that "at least they do no more than that," Mr. Justice Blackmun concluded that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm" (Cert A 40a). Other facts which are possibly implicative of the accused—*e.g.*, "those associated with the circumstances of his arrest," "facts associated with the accused's criminal record, if he has one;" "[c]ertain statements as to the accused's guilt by those associated with the prosecution"—were held to be potentially proper subjects for restraint prior to the trial if the burden of proof set forth by Mr. Justice Blackmun was satisfied (Cert A 41a). That burden, he said, was whether "publicizing particular facts will irreparably impair the

ability of those exposed to them to reach an independent and impartial judgment as to guilt" (*id.*).

Mr. Justice Blackmun concluded his November 20 ruling by noting that the Supreme Court of Nebraska "may well conclude that other portions of that order are also to be stayed or vacated" (Cert A 42a).

On November 21, the Petitioners filed a motion with all Justices of this Court to vacate so much of Mr. Justice Blackmun's November 20 order as had not stayed the imposition on the press of any prior restraint on publication.

On November 25, the Supreme Court of Nebraska heard oral argument upon the Petitioners' request for a stay of the District Court's order. On December 1, the Supreme Court of Nebraska issued a *per curiam* opinion. Two judges dissented on the ground that this Court's actions had displaced any jurisdiction in the Nebraska Supreme Court, and two other judges, although agreeing with this view, joined the opinion of the final three judges solely in order to avoid what would otherwise have been a procedural deadlock. The final three judges, who were thus joined by the two concurring judges, held as follows:

> We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon the freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.
>
> The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings. [Cert A 63a-64a.]

The Supreme Court of Nebraska also remanded the defendant's request for all future pretrial proceedings to be closed to the District Court with instructions to consider such applications in the future in accord with A.B.A. Fair Trial and Free Press Standard 3.1: Pretrial Hearings, which the Court incorporated and adopted in its opinion (Cert A 64a-65a).

On December 4, Petitioners applied to this Court for a stay of the Supreme Court of Nebraska's order and further moved this Court to treat their previously-filed papers as a Petition for a Writ of Certiorari. On December 8, this Court denied without prejudice the Petitioners' motion of November 21 which sought to vacate in part Mr. Justice Blackmun's November 20 stay order inasmuch as that order had expired on December 1, the date of the Supreme Court of Nebraska's order. This Court granted Petitioners' motion to treat the previously-filed papers as a Petition for a Writ of Certiorari, consideration of which was deferred until additional papers were received by this Court or until the close of business on December 9; consideration was also deferred of the application for stay of the order of the Supreme Court of Nebraska (Cert A 70a). (Justices Brennan, Stewart and Marshall would have granted the latter application.)

On December 12, this Court granted the Petition for a Writ of Certiorari; denied the motion to expedite (Justices Brennan, Stewart and Marshall dissenting); denied the application for a stay (Justices Brennan, Stewart and Marshall dissenting in whole; Justice White dissenting with respect to the publication of information disclosed in public at the preliminary hearing in the *Simants* case); and invited the submission of an amended Petition for a Writ of Certiorari (Cert A 71a), which was filed with the Court on December 24, 1975.

(b) Post-certiorari Matters

Since this Court granted the Petition for a Writ of Certiorari herein on December 12, 1975, the underlying criminal case of *State* v. *Simants* has proceeded through the trial, with the defendant having been found guilty by the jury of six counts of murder in the first degree. We bring to this Court's attention for informational purposes only certain matters relating to the Simants case that have occurred since the granting of certiorari.

On December 23, 1975, the defendant, a Respondent in this Court, filed in the District Court (a) an application for a change of venue to another county; (b) a motion to sequester the jury; (c) a motion for restricted voir dire, so that no more than four members of the prospective jury could be voir dired at any one time, with the others sequestered; and (d) a motion to close to the press and the public all hearings prior to the time of the trial scheduled for January 5, 1976.[10]

[10] On December 24, the defendant served notice that one of his defenses would be insanity or mental derangement.

On December 29, Petitioners requested permission to enter an appearance in the criminal case in opposition to the defendant's motion to close the pre-trial hearings, and to file a pleading and brief in opposition thereto. The defendant opposed the applications, and the District Court denied Petitioners the right to appear, argue or file supporting papers. The District Court ordered no further participation by the Petitioners or their counsel in any form in the criminal case.

Immediately thereafter, the District Court denied the defendant's application for a change of venue, granted his motion to sequester the jury, granted the motion for a restricted voir dire of prospective jurors, and denied the defendant's motion to close the pre-trial hearings. Immediately thereafter, defense counsel moved to close the court for a *Jackson* v. *Denno* hearing. The court granted the motion, directed that everyone but officers of the court leave the courtroom, and then proceeded to conduct a closed *Jackson* v. *Denno* hearing. Petitioners requested a stay of the District Court's order closing the *Jackson* v. *Denno* hearing, but the stay was denied.

On January 2, 1976, the defendant filed a motion to close the voir dire portion of the trial to the press and the public. Three days later, Petitioners filed a declaratory judgment action against the State and Simants with respect to the constitutionality of closing pre-trial and trial proceedings, sought a stay and an injunction against such closing, and moved for an immediate hearing and expedited proceedings. (This suit is still pending in the Lincoln County District Court.) The District Court consolidated these matters with the criminal case. It then denied all relief sought by the Petitioners and granted the defendant's motion

to close the voir dire portion of the trial, ruling that the voir dire constituted a pre-trial matter and that the trial did not start until the formal swearing in of the twelve qualified jurors.[11]

The defendant pleaded not guilty by reason of insanity, and the voir dire proceeded. Of the 19 prospective jurors examined that day, 11 were passed for cause, seven excused for cause other than pre-trial publicity, and one temporarily excused and ordered to return the next day for further examination. At the conclusion of the voir dire on January 5, the District Court reversed its earlier order and opened the jury selection process to the press and public, saying:

> Having profited from the first day's voir dire and listened to the questions that have been asked of the prospective jurors, I have not observed any questions asked that I feel could prejudice other jurors disproportionately with the disadvantages of the obvious extreme measures that are involved in closing the voir dire examination to the members of the general public and the members of the press. And so, at this time I do change the order that I entered this morning and will allow members of the press and members of the public to attend the remainder of the voir dire. However, prior to their admission to the courtroom, I will ask the members of the press to report to me in chambers in order that we may further emphasize the admonitions against the violation of the bar press guidelines.

On January 6, the District Court met with members of the press. After noting that "In my opinion there is a very strong case against the defendant here," Judge Stuart said he had three areas of concern in

[11] See n. 21, *infra*.

regard to reporting the voir dire. He asked if members of the press had any problem with his request not to publish, making clear that only those agreeing to his conditions would be allowed in the courtroom. All newsmen present determined that they could not abide by the conditions, and they were thereupon excluded from the voir dire, which continued for the balance of the day. Voir dire was completed on January 7, the jury was impanelled, and the trial proceeded to conclusion on January 17. During this period all of the information previously prohibited from being published was received in evidence, a substantial portion of it being testified to by witnesses for the defense.

We agree, of course, with the implicit decision already made by this Court [12] that the instant case has not been mooted by the expiration of the Nebraska Supreme Court's order. The case is a classic example of the *Southern Pacific* exception to the mootness doctrine: it involves "short term orders, capable of repetition, yet evading review * * *." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).[13] This exception to the mootness doctrine has recently received recognition in *Weinstein* v. *Bradford*, 44 U.S. L.W. 3372 (U.S. Dec. 16, 1975), and *Sosna* v. *Iowa*, 419 U.S. 393 (1975): there is no mootness if the challenged action is too short in duration to be fully litigated prior to its expiration, and there is a reasonable likelihood that the same parties could be subjected to

[12] The Court, with full recognition that the Simants trial was imminent (see Petitioners' applications to this Court to vacate part of Mr. Justice Blackmun's November 20 order and to treat the previously filed papers as a Petition for a Writ of Certiorari), denied Petitioners' motion to expedite and application for a stay, and set the case for argument in the ordinary course.

[13] See also *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-126 (1974); *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

the same action again. That is precisely the situation here.

It is clear that unless a decision is reached now with respect to the constitutionality of prior restraints against the publication of news, this Court will be confronted with a plethora of such cases [14]—invariably arising in the context of hastily briefed motions for a stay which, by their terms, expire quickly enough to raise serious questions of mootness. In addition, lower courts will continue to be confused and at odds with each other over the constitutionality of prior restraint orders.[15]

The exception to normal the mootness doctrine is especially applicable where First Amendment rights are

[14] This is the third case to reach the Court within two years involving the constitutionality of prior restraints imposed on the press with respect to its reporting about judicial proceedings. In this case, as in *Times-Picayune Pub. Corp.* v. *Shulingkamp*, 419 U.S. 1301 (1974), and *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975), the case came before the Court on a motion for a stay, thus presenting the Court with what Mr. Justice Blackmun has referred to as "an issue of profound constitutional implications, demanding immediate resolution * * *" (Cert. A 27a).

[15] Mr. Justice Blackmun's In Chambers decision of November 20, although apparently mooted (see Cert A 70a) by the subsequent December 1 decision of the Nebraska Supreme Court, has already begun to be relied upon by lower courts as a ground for the entry of orders directly restraining the press from publishing news. See, *e.g.*, *People* v. *Carson*, Indict. No. 4296-73, King's Co. N.Y. Crim. Term 1976, January 15, 1976, transcript pp. 575-576 (media prohibited from publishing certain information about defendant during trial); *Nebraska* v. *Shonka*, Dist. Ct. of Butler Co., Neb., Docket 26, p. 32, November 24, 1975, transcript p. 13 and order entered November 26, 1975, Par. 4 (media prohibited from publishing certain information about defendant prior to trial).

In addition, see generally the Press Censorship Newsletters Nos. I-VIII published by the Legal Defense and Research Fund of the Reporters Committee for Freedom of the Press, Washington, D.C.

at stake. In *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), this Court struck down a state court order restraining for ten days the members of the National States Rights Party from holding a public assembly, even though the order had long since expired. Similarly, the Court of Appeals for the Third Circuit reached and decided the merits of a restrictive order notwithstanding the fact that it had lapsed in *United States* v. *Schiavo*, 504 F.2d 1 (1974) (*en banc*), *cert. denied*, 419 U.S. 1096 (1975), holding that "this case is reviewable as a dispute 'capable of repetition, yet evading review'," and citing *Southern Pacific*. The same rulings are appropriate in this case.

SUMMARY OF ARGUMENT

There need be no conflict between First and Sixth Amendment rights in a case of this kind, because courts have available to them a whole range of methods to protect a criminal defendant from the possibly adverse effects of publicity concerning his case. As we show in Part I of our Brief, these methods range from change of venue and continuance to voir dire and sequestration. But, as this Court taught in the *Sheppard* case, they do *not* include direct prior restraints on the press. Such restraints are not only constitutionally void but unnecessary, because jurors, properly screened and instructed after the application of the protective measures referred to above, are fully capable of reaching independent judgments based on the evidence introduced at trial. The supposition that the type of publicity generated by this case—factual and performed in the public interest—is necessarily going to prevent a jury from being impartial is simply unsupportable.

In any event, as we show in Part II, this Court has made clear on a number of prior occasions that regardless of what the system may be in other countries, our First Amendment does not allow one branch of government, the judiciary, to dictate to the press, in advance of publication, what information will and will not reach the public. If there is an exception to this otherwise absolute rule, it is only that: a single, narrow exception, totally inapplicable to the facts of this case. By engaging in a balancing of interests, and by misinterpreting a single dictum in one of this Court's opinions, the Nebraska Supreme Court has stood the First Amendment on its head and made the publication of news depend upon what any given court may decide would be detrimental to a defendant at some future point in time. Not only this Court's rulings, but events over the last half century in other parts of the world, teach us that this can be the fatal first step in the censorship, subugation or destruction of a free press.

Finally, regardless of what criteria or formulae are applied in this case, the Nebraska prior restraint order cannot be upheld. This is so, as we demonstate in Part III, because the evidence of record, the findings made and the standards applied are totally insufficient to justify a prior restraint of any kind. The record simply will not support the conclusion reached.

ARGUMENT

It is now a truism, in Mr. Justice Black's much repeated phrase for this Court, that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges* v. *California*, 314 U.S. 252, 260

(1941). This case requires no such trying choice. It poses no problem as to when, if ever, the press may be held liable in contempt for publishing material, *Craig* v. *Harney*, 331 U.S. 367, 373 (1947); it raises no question as to the extent to which attorneys and others may be barred from speaking with the press, *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975); and it does not deal with the question of whether the press, in performing its news gathering functions, has any greater rights than the general public. *See Branzburg* v. *Hayes*, 408 U.S. 665 (1972).[16]

This is a prior restraint case. It involves a judicial bar which lasted in one form or another for over ten weeks—from October 22, 1975 until January 7, 1976—on the reporting of news by Petitioners, part of the Nebraska news media. As such, the case relates to what has long been acknowledged to be the core of the First Amendment. As summarized by Professor Bickel in his final book, "[p]rior restraints fall on speech, with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss —a loss in the immediacy, the impact of speech. * * * Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech."[17]

A part of what is involved in this case is reporting with respect to publicly-attended court proceedings and court files open to the public. The uncontested

---

[16] Indeed, it is apparently the view of the Nebraska Supreme Court that the press has fewer First Amendment rights than the members of the public generally, none of whom has been subject to the prior restraint here at issue (see Cert A 57a-58a, 64a).

[17] Bickel, *The Morality of Consent* 61 (1975).

affidavits submitted to the Nebraska courts demonstrate that most if not all of the information which Petitioners were enjoined from publishing is information that either was publicly testified to in open court during a preliminary hearing or was contained in documents on public file with the Nebraska courts. As to all such information, the never modified or limited language of this Court in *Craig* v. *Harney, supra,* 331 U.S. at 374, would appear to be dispositive:

> A trial is a public event. What transpires in the court room is public property. * * * Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutons of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Again, in *Estes* v. *Texas,* 381 U.S. 532, 541-542 (1965), this Court observed that "* * * reporters of all media * * * are plainly free to report whatever occurs in open court through their respective media."

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), even though the vehicle for suppression of news was a suit for damages *after* publication rather than the more restrictive and onerous prohibition against publication *prior* to the event, the Court nevertheless struck down the judgment against the press. The publication of the name of a rape victim in advance of a criminal trial could not be made the basis for damages because, as the Court reiterated time and again,[18] the name of the victim had already been made part of the public court record in advance of that crim-

[18] *Id.* at 473, 491, 492, 494, 495, 496.

inal trial. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it" (*id.* at 496). The reason is clear: the press, by publishing, is merely giving further publicity to information that is already public (*id.* at 494). "The commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions * * * are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government" (*id.* at 492). "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served" (*id.* at 495).[19]

The same point was made in slightly different form in *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). In explaining why it was so important for the press to provide information about the judicial process, the Court said:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. * * * [*Id.* at 350.]

[19] The Court should note that all of the records from which Petitioners received information in the instant case had also been made public by the prosecution.

So unequivocal have the opinions of this Court been on this subject that the Court of Appeals for the Fifth Circuit could, in *United States* v. *Dickinson*, 465 F.2d 496, 507 (5th Cir. 1972), correctly summarize this Court's prior rulings by saying that:

> * * * [O]ne significant circumstance is readily apparent—no decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court. [Footnote deleted.[20]]

If that were all that was involved in this case (and it is most of what is involved), we would respectfully suggest to the Court that summary reversal of the Nebraska Supreme Court opinion would be in order.

But the injunction of the Nebraska Supreme Court swept beyond its patently unconstitutional bar on the reporting of that which had already been observed in open court or in open files. It totally barred, until the jury was sworn,[21] any publication of:

---

[20] For a subsequent ruling adhering to the prior decision on the issue of contempt, see *United States* v. *Dickinson*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

[21] As already noted, the District Court apparently took the position that trial did not comence until the jury was sworn and that therefore its prior restraint was entirely a "pre-trial" order. This was error. It is abundantly clear in American law that the trial begins when the potential jurors are first gathered for the selection of a final panel. *E.g.*, *Lewis* v. *United States*, 146 U.S. 370 (1892); *Hopt* v. *Utah*, 110 U.S. 574 (1884); *Pointer* v. *United States*, 151 U.S. 396 (1894); *Echert* v. *United States*, 188 F.2d 336 (8th Cir. 1951); *Scott* v. *State*, 113 Neb. 657, 204 N.W. 381 (1925); *Ward* v. *Territory*, 8 Okla. 12, 56 Pac. 704 (1899); *State* v. *Carver*, 94 Idaho 677, 496 P.2d 676 (1972).

> (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statement, if any, made by the accused to representatives of the news media. (3) Other information sharply implicative of the accused as the perpetrator of the slayings. [Cert A 64a.]

Insofar as such information was obtained from open court proceedings or files, we submit that its publication is clearly protected from prior restraint by the cases referred to above. However, the Nebraska prohibition is so broad that it would appear also to cover information which Petitioners received from third parties during the normal course of their coverage of the Simants judicial proceedings. To that extent, it will require further comment. First, however, we demonstrate that there are ample means, short of any possible intrusion on First Amendment rights, to fully protect a defendant's Sixth Amendment rights.

I.

Sixth Amendment Rights May Be Fully Protected Without the Imposition of Prior Restraints on the Press

The Nebraska courts start from the pr mise that there is necessarily a conflict between the press's right to publish under the First Amendment and the defendant's right to a fair trial under the Sixth, and that given such a conflict, the First Amendment must yield. This attitude not only permeates the December 1 opinion of the Nebraska Supreme Court but was perhaps most starkly stated by the County Court on October 22: "When these rights come into conflict, then the right of free press must be subservient to the right

of due process" (JA 90). We believe this premise to be the first error of the Nebraska courts, and one that underlies much of the bad law that thereafter developed at each step of the way.

The concept that a defendant can receive a fair trial only by the suppression of news is not only insupportable but directly contrary to the teachings of this Court.

Except in the most exceptional case, carefully selected jurors are fully able to exercise their independent judgment of guilt or innocence based on the evidence introduced in court, whether or not they have read or heard about the case beforehand. This is attested to both by individual example and by studies. Perhaps the most obvious recent example is the trial of former Attorney General John Mitchell in New York City, where he was acquited despite a continuous, long-lasting and pervasive barrage of pre-trial publicity. Several recent studies have cast great doubt upon the degree to which the media actually affect potential jurors.[22] Indeed, the most complete study of the jury system of which we are aware concludes that:

[22] *E.g.*, Simon, "Murder Juries and the Press," Transaction (May-June 1966); Kline and Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," 43 Journ.Quart. 113 (1966). As summarized in Gillnor, "Free Press v. Fair Trial: a Continuing Dialogue. Trial by Newspaper and the Social Sciences," 41 N.Dak. L.Rev. 156, 171 (1964):

> If a tentative conclusion may be ventured at this point, it is that there is no empirical evidence to support the view that extensive, or even irresponsible, press coverage of a court case destroys the ability of jurors to decide the issue fairly.

The following press release dated December 24, 1975, from the News Bureau of Marquette University in regard to a study conducted by a psychology professor bears upon this point.

> Pre-trial publicity may not be a factor in influencing potential jurors in a criminal trial, according to a Marquette University psychology professor.
>
> Assistant Professor Harry E. Rollings used the Patty Hearst case recently as a model in an introductory psychology course to determine whether newspaper and broadcast accounts of the case influenced the attitudes of Marquette students. Rollings, who specializes in industrial psychology, designed the survey with James J. Blascovich, Assistant Professor of Psychology.
>
> Rollings developed a series of questions about the prosecution of Hearst, the daughter of publisher William Randolph Hearst who faces charges from a Los Angeles County Grand Jury of robbery, kidnapping, and assault. He presented the questions to 438 students the day following her arrest and again one month later. The second survey followed several weeks of publicity regarding brainwashing as a possible defense for Hearst.
>
> In both surveys the students were asked whether they believed Hearst was brainwashed and what they thought her sentence would be. There was no substantial difference in the students' answers in the surveys, Rollings said, despite widespread media coverage of the brainwashing Theory. Only nine percent in the first survey and eight percent in the second said they believed Hearst was brainwashed, he said.
>
> In regard to sentencing, no substantial change in attitudes was noted, he said. Over two-thirds of the students in both surveys predicted some type of prison sentence for Hearst and co-defendants William and Emily Harris. The average length of sentence predicted was seven years for Hearst and 17 and 14 years respectively for the Harrisses. About 25 percent of the students indicated in both surveys that Hearst would receive only probation. • • •

> • • • contrary to an often voiced suspicion, the jury does by and large understand the facts and get the case straight [and that] the juror's decision by and large moves with the weight and direction of the evidence. [Kalven and Zeisel, *The American Jury* (Phoenix Ed. 1971).]

Thus, in *Murphy* v. *Florida,* 421 U.S. 794 (1975), where several jurors had heard about the defendant's

past crimes, this Court nevertheless affirmed the guilty verdict, noting that:

> * * * exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process. [*Id.* at 799.[23]]

And in *Irvin* v. *Dowd,* 366 U.S. 717, 723 (1961), the Court said:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Finally, in *Calley* v. *Callaway,* 519 F.2d 184, 210 (5th Cir. 1975), the court made these very salient comments:

> If, in this age of instant, mass communication, we were to automatically disqualify persons who have heard about an alleged crime from serving as a juror, the inevitable result would be that truly heinous or notorious acts will go unpunished. The law does not prohibit the informed citizen from participating in the affairs of justice. In prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system of justice.

Moreover, there are ample methods, short of suppression of news, for making certain that jurors are

---

[23] See also *Beck* v. *Washington,* 369 U.S. 541, 555-558 (1962); *Sheppard* v. *Maxwell, supra.*

protected from any preconceived bias or prejudice. The entire point of the *Sheppard* v. *Maxwell* discussion was to set forth a variety of methods, *excluding* prior restraints, by which jurors could be insulated from possible prejudicial publicity. The means were varied. *Sheppard* itself had involved a situation in which "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard" (384 U.S. at 355). In response to this, the Court suggested strict rules governing the use of and movement in the courtroom by the media so as to prevent a carnival atmosphere. Also suggested were the adoption of moves to insulate witnesses from excessive press exposure; control of releases by police officers, witnesses and counsel; admonitions to the jury to disregard media coverage; the use of *voir dire* to insure avoidance of prejudice to defendants; changing the venue of trials; continuances; sequestration: and finally, where necessary, new trials.[24]

---

[24] We do not, in this brief, deal with the constitutional validity of orders to witnesses, parties and the like not to make statements to the media. There are surely significant constitutional limits on the power of courts to limit the comments of attorneys and others. See *Chicago Council of Lawyers* v. *Bauer, supra.* There is also substantial doubt as to the constitutionality of suppressing at all the right of an accused in a criminal case to speak publicly about his case. See Barist, "The First Amendment and Regulation of Prejudicial Publicity—An Analysis," 36 Fordham L.Rev. 425, 443 (1968); Royster, "The Free Press and a Fair Trial," 43 N.C.L.Rev. 364 (1965).

In this regard, note Judge Murray's comment in *United States* v. *Mandel,* D.C. Md., Crim. No. HM75-0822, December 19, 1975, wherein he denied an order forbidding the parties to speak to the press about a pending criminal proceeding: "* * * it seems to the Court that to impose the restrictions on the speech of all individuals connected with the case as contemplated by the order would inhibit

Each of the methods described above, and all of them, have been used by courts to insure the impartiality of jurors. Judges may, and, of course, should, provide cautionary instructions to jurors in an effort to insulate them from the possible effects of publicity. In other circumstances, such instructions are deemed sufficient to protect a defendant from the possibility of jurors improperly using evidence admitted for one purpose for another prohibited one. For example, jurors are instructed with respect to the limited evidentiary value of materials before them, *United States* v. *McIntosh*, 426 F.2d 1231 (D.C. Cir. 1970); jurors are instructed as to the admissibility of confessions introduced as to other defendants, *United States* v. *Leviton*, 193 F.2d 848, 856 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952); jurors are given instructions as to conclusions not to be drawn from the invocation of the Fifth Amendment privilege, *United States* v. *Kilpatrick*, 477 F.2d 357 (6th Cir. 1973); and jurors are advised not to apply a guilty plea of one defendant to another. *United States* v. *Davis*, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).

All these instructions are sophisticated ones. They require serious, even dedicated, efforts by jurors to abide by them. After the receipt of such instructions jurors are presumed under our system of justice competently to apply the instructions as given and to make judgments based only on the facts and law as limited by the instructions given them. *See, e.g., Blumenthal* v. *United States*, 332 U.S. 539, 552-553 (1947). And

press coverage to almost the same extent as a restriction laid directly upon the publishers of news" (slip. op. 4).

We emphasize, however, that no such limited orders are involved in this case.

courts do not easily conclude that jurors have failed to abide by the instructions received.

With specific reference to the possibility of prejudicial publicity unfairly affecting the ability of a jury to decide a case on the evidence presented to it, a trial judge may, as *Sheppard* suggests, use the *voir dire* to ascertain the effect of publicity. *Voir dire* has been recognized and utilized by the courts as an effective device for uncovering juror bias. As far back as *United States* v. *Burr*, 25 Fed. Cas. 49, 51 (Cas. No. 14,692g) (1807), Chief Justice Marshall laid down standards by which jurors might be questioned as to their impartiality in the face of widespread pretrial publicity. *See also, United States* v. *Callender*, 25 Fed. Cas. 239, 244 (Cas. No. 14,709) (1800).

This Court has frequently indicated its confidence in the effectiveness of *voir dire*. See, *e g., Ham* v. *South Carolina*, 409 U.S. 524 (1973). It has referred to the extensive *voir dire* permitted in this country as compared to England, where there is "greater control * * * over pretrial publicity." *Swain* v. *Alabama*, 380 U.S. 202, 218 n. 24 (1965). And it has, in numerous cases, approved the use of *voir dire* in the specific context of a trial court's ascertaining the effect of pretrial publicity on jurors. *Margoles* v. *United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969), illustrates the beneficial effects of the careful supervision of the court in the *voir dire* examination in a case involving alleged prejudicial pretrial publicity.

> There then followed more extensive instructions and questions by the court, including a strong, thorough statement on the presumption of innocence. Similar statements were later made by defense counsel. From the responses given by some

of the veniremen, there does not appear to have been any hesitance on their part to answer frankly and candidly. * * *

We hold that the procedures employed by the district court at the *voir dire* examination of prospective jurors were adequate to safeguard petitioner against the effect of prejudicial pre-trial publicity, protected his right to a fair trial, and met the standards set by the Supreme Court and this Court in dealing with similar cases. [*Id.* at 730.]

And in *United States* v. *Kahaner*, 204 F.Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), Judge Weinfeld wrote:

That a case has been the subject of extensive publication or even comment does not, in and of itself, require automatic continuance of a trial; if that were the rule it would mean that, unless the press voluntarily refrained from continuing publicity, cases involving public officers or public figures could never be brought to trial. The fundamental question remains no matter what the trial date—can a fair and impartial jury be obtained which will decide the issues in the case solely upon the evidence presented in the courtroom? *Whether or not the publicity has been of such a nature that the selection of a fair and impartial jury is foreclosed at this time cannot be determined until jurors are questioned on the voir dire.* [Emphasis added; footnotes deleted.[25]]

[25] For subsequent proceedings, see *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

Trial judges who conduct voir dire examinations have broad discretion to assess the impartiality of jurors. *E.g.*, *United States* v. *De Larosa*, 450 F.2d 1057, 1062 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972); *United States* v. *Cimini*, 427 F.2d 129 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970); *United States* v. *Williams*, 496 F.2d 383 (1st Cir. 1974); *United States* v. *Bando*, 244 F.2d 833 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957).

Both change of venue and continuance are techniques of wide and long-standing acceptance, and are recommended by federal and state case law to mitigate the effects of pretrial publicity.[26] *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Sheppard* v. *Maxwell*, *supra*; *United States* v. *Collins*, 472 F.2d 1017 (5th Cir. 1972), *cert. denied*, 411 U.S. 983 (1973); *Commonwealth* v. *Douglas*, 337 A.2d 860 (Pa. S.Ct. 1975).

Continuance, as the court noted in *United States* v. *Dioguardi*, 147 F.Supp. 421, 422 (S.D.N.Y. 1956):

* * * serve[s] the practical purpose of enabling the community within the district, which constitutes the reservoir of jurors, to free its judgment from any possible emotional tension [from pretrial publicity] that may exist.

And as to change of venue, the court in *Pamplin* v. *Mason*, 364 F.2d 1, 5 (5th Cir. 1966), stated:

* * * [W]here outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

Similarly, in *Maine* v. *Superior Court of Mendocino County*, 66 Cal. Rptr. 724, 438 P.2d 372, 377 (1968), the court said:

In many cases that are the focus of unusual public attention, the effect of prejudicial pretrial disclo-

[26] As we have noted, the trial court denied an application in this case for a change in venue; neither the prosecutor nor the defendant requested a continuance, and the court failed to grant one *sua sponte*.

sures or widespread community antagonism can be substantially overcome by a change of venue.[27]

Since the order in this case was interpreted and applied by the trial judge to cover not only pre-trial proceedings but the impaneling and final selection of a twelve-person jury, it is relevant to add sequestration to the list of tools available to courts to prevent jury exposure to prejudicial influences arising during trial.[28]

---

[27] Of course, if all other means of protecting jurors fail, and prejudicial publicity really does prevent a fair trial, the ultimate method of rectifying the situation is a reversal of the criminal conviction. We hasten to point out, however, that such reversals can be avoided in situations in which trial courts adhere to the methods set forth in *Sheppard*. Moreover, we know of no case in which someone has actually gone free because of such a contingency occurring. The Nebraska Supreme Court's opinion seizes upon the reversal concept and suggests that this is too high a price to pay in the interest of avoiding what would otherwise be a conceded intrusion upon the First Amendment freedoms. However, opinions from Justices of this Court make clear that in that extraordinarily rare cases where reversal is the only remedy to avoid the denial of basic constitutional rights, it is not too high a price to pay. See *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961); *Linkletter* v. *Walker*, 381 U.S. 618, 650 (1965) (Black, J., dissenting); *Olmstead* v. *United States*, 277 U.S. 438, 469-470 (1928) (Holmes, J., dissenting).

[28] *See also People* v. *Hagel*, 32 Ill.2d 413, 206 N.E.2d 699, 701, *cert. denied*, 382 U.S. 942 (1965); Stanga, "Judicial Protection of the Criminal Defendant Against Adverse Press Coverage," 13 Wm. & Mary L.Rev. 1, 23-29 (1971); *Sheppard* v. *Maxwell*, *supra*, 384 U.S. at 353. In upholding a trial court's employment of the sequestration device over the objection of the defendant, the Court of Appeals for the Seventh Circuit observed:

> It is quite clear to us, as it was to the trial court, that because of the local prominence of defendant, the problem of adverse newspaper and other publicity was to be an important factor in defendant's trial strategy. This was a proper element for defendant to consider. It is equally apparent to us that the trial court's decision to sequester the jury, designed as it was to insulate the jurors from local prejudice, was a sound exercise of its discretion. [*United States* v. *Holovachka*, 314 F.2d 345, 352 (7th Cir.), *cert. denied*, 379 U.S. 809 (1963); citations omitted.]

The use of the court's power to sequester juries has been judicially approved as a "commendable procedure" (*Wansley* v. *Miller*, 353 F. Supp. 42, 50 (E.D. Va.), *rev'd on other grounds sub nom. Wansley* v. *Slayton*, 487 F.2d 90 (4th Cir. 1973), for just such purposes. Thus, in *Times-Picayune Pub. Corp.* v. *Schulingkamp, supra*, 419 U.S. at 1308 n.3, Mr. Justice Powell noted that "respondent has indicated his intention to sequester the juries. This will protect against many of the hazards that the selective restrictions on reporting during trial are designed to prevent."

We emphasize again that the methods suggested in *Sheppard* for the protection of the defendant's Sixth Amendment rights do *not* include the exclusion of the press from the courtroom at either trial or pre-trial stages—the latter having been suggested in the decision of the Supreme Court of Nebraska. That *Sheppard* omitted any such suggestion is not surprising in light of the Sixth Amendment mandate concerning public trial.[29] Indeed, Mr. Justice Black in *In re*

---

[29] In *Oxnard Publishing Co.* v. *Superior Court*, 68 Cal.Rptr. 83, 94-95 (Ct.App. 2d Dist. 1968), the court noted:

> That case, however, contains no suggestion that criminal trials, or parts of trials, should be conducted in closed session. None of the remedies it advances for the control of prejudicial publicity—sequestration of the jury, continuance of the trial, change of venue, directions to the jury not to read or listen to news reports, insulation of witnesses, control of the release by participants of information to the press—implies any abandonment of the tradition of public trial. Indeed the opinion seems to emphasize the contrary, when in discussing the control of trial publicity it declares that it should have been the aim of

Oliver, 333 U.S. 257 (1948), speaking of the right to public trial, was able to state for the Court that in addition to the Federal Constitution, "[t]oday almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public" (*id.* at 267-268; footnotes deleted). And that:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet.* All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. [*Id.* at 268-270; footnotes deleted.[30]]

---

the trial court to induce the reporting of the case "as it unfolded in the courtroom—and not as pieced together from extrajudicial statements." [Citation omitted.]

[30] Contained in Mr. Justice Black's historical analysis of the right to public trial is a footnote stating:

> "No court has gone so far as affirmatively to exclude the press." Note, 35 Mich. L. Rev. 474, 476. Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community. Radin, *The Right to a Public Trial,* 6 Temp. L. Q. 381, 394-395; 20 J.Am.Jud.Soc. 83. [333 U.S. at 272 n. 29.]

Thus, while that portion of the decision of the Supreme Court of Nebraska relating to the closing of pretrial hearings at the request of a defendant is not squarely before the Court, we do urge that this Court, in its consideration of the appropriate methods to avoid the potential harm to the Sixth Amendment rights of defendants, not adopt or encourage limitations on the right of the press and the public to attend pre-trial hearings.[31]

Finally, a variety of studies subsequent to *Sheppard* strongly support the utilization of the means discussed herein to protect Sixth Amendment rights; none suggests or appears to believe that prior restraints on the press are either constitutional, wise or required as a method of "accommodating" both Amendments. Thus, the Kaufman Report (Report to the Judicial Conference of the United States on the Operation of the Jury System) on the "Free Press-Fair Trial" issue concluded:

> The Committee does not presently recommend any direct curb or restraints on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems. [Pp. 401-402.]

---

[31] See, *e.g., United States* v. *Clark,* 475 F.2d 240, 246-247 (2d Cir. 1973); *United States* v. *Kobli,* 172 F.2d 919 (3d Cir. 1949); *Phoenix Newspapers Inc.* v. *Jennings,* 107 Ariz. 557, 490 P.2d 563 (1971); Geis, "Preliminary Hearings and The Press," 8 U.C.L.A. L.Rev. 397, 413 (1961).

Similarly, the Medina Report prepared by the Special Committe on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York (Freedom of the Press and Fair Trial) concluded that prior restraints could and should not be utilized against the press and that:

> In sum, our conclusion is that constitutional guarantees would stand in the way of most efforts to regulate the relationship between trials and the media, whether by legislation or by use of the contempt power. And perhaps this is as it should be, for such efforts would embroil the courts in constant conflicts between the courts and the media, which would naturally resist official efforts to restrict their freedom. Such conflicts would not serve to improve the administration of justice but would only estrange those whose common interest should be improvement. This would result in many criminal cases, which are now adversary proceedings between the state and the defendant, also becoming adversary proceedings between the courts and the media, and we cannot believe that this would advance the public interest. Accordingly, because we believe that as a matter of both constitutional law and policy, an approach through legislation or extension of the contempt power is neither feasible nor wise, our recommendations proceed along other lines. [Pp. 10-11.[32]]

The Reardon Report of the American Bar Association, Standards Relating to Fair Trial and Free Press (1966) (the ABA Legal Advisory Committee on Fair Trial and Free Press) similarly did not recommend any use of prior restraints against the press under any

[32] For Judge Medina's more current views reaching the same conclusion, see his article in the *New York Times* entitled, "Omnibus 'Gag' Orders," November 30, 1975, Sec. IV, p. 13.

circumstances. It did (i) recommend revisions in the canons of professional ethics (subsequently adopted as DR7-107) to control conduct of prosecution and defense counsel; (ii) recommend standards of conduct for judges and judicial employees; (iii) recommend that law enforcement agencies be encouraged to adopt standards; (iv) make recommendations as to the appropriate conduct of judicial proceedings in criminal cases; and (v) make recommendations as to the use of the contempt powers.

The most recent report of which we are aware reaches similar conclusions. A revised draft of "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press" was issued by the ABA Legal Advisory Committee on Fair Trial and Free Press, in November 1975. The draft, which proposes certain procedures prior to the entry of any restrictive orders, is itself a recognition that the press is not usually afforded any procedural safeguards prior to the issuance of orders which would effectively reduce the flow of information to it and to the public—orders to court officers, counsel and the like. As the reports before it had done, this latest report speaks unequivocally as to its hostile view to any direct restraints upon the media.

> First by recommending the procedure for adoption of Standing Guidelines and Special Orders, the Committee wishes to stress that it does not intend to recommend or encourage the use of judicial restrictive orders. Further, given the apparent ever-increasing tension between the courts and the press in executing their respective functions, and the significant constitutional problems which may be raised by the issuance of certain restrictive orders, *the Committee specifically rec-*

ommends against the issuance of any orders which would impose direct restraints on the press. It is clear that the free flow of information concerning court business is important and necessary not only to the requirements of a free press and a fair and public trial, but the greater public understanding of the judicial function and the rule of law in our society. [Emphasis added.]

To the same effect, see Roney, "The Bar Answers the Challenge," 62 A.B.A.J. 64 (1976).

In short, the means set forth in *Sheppard* for assuring full Sixth Amendment protections for defendants have been supported by each of these studies, none of which recommends any effort to utilize prior restraints against publication. And the imaginative use of these methods provides defendants with full Sixth Amendment protections,[33] without any intrusion into First Amendment rights.

II.

The Imposition by the Nebraska Courts of Prior Restraints on Reporting About Criminal Proceedings Is in Direct Violation of the First Amendment

Prior to the 1930's, it was simply assumed by this Court that prior restraints on the press violated the First Amendment. In fact, so clear was the bar believed to have been imposed by the First Amendment upon prior restraints on publication that Mr. Justice Holmes, writing for this Court in *Patterson* v. *Colorado Ex rel. The Attorney General*, 205 U.S. 454, 462 (1907), could unequivocally state that:

[33] The judiciary appears generally to agree. See, F. S. Seibert, "Trial Judges' Opinion on Prejudicial Publicity" (1970).

> * * * [T]he main purpose of such constitutional provisions [the First and Fourteenth Amendments] is "to prevent *all* such *previous restraints* upon publications as had been practiced by other governments." * * * [Emphasis partly added and partly in the original.[34]]

[34] Mr. Justice Holmes' quotation is taken from two cases decided in the formative days of the nation, *Commonwealth* v. *Blanding*, 3 Pick. 304, 313-314 (1825), and *Respublica* v. *Oswald*, 1 U.S. (1 Dall.) 319, 325 (1788).

Even in early days, state decisions consistently held that prior restraints on publication were impermissible regardless of the facts sought to be suppressed. *E.g.*, *Brandreth* v. *Lance*, 8 Paige Ch. 24 (N.Y. 1839). Thus, in *Dailey* v. *Superior Court*, 112 Cal. 94, 44 Pac. 458 (1896), the Supreme Court of California refused to enjoin the production of a play about a pending murder trial despite the claim of the defendant in that trial that he was being seriously prejudiced. The court said:

> By the [California] constitutional provision we are about to invoke, a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. * * * The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. [44 Pac. at 459.]

See also *In re Shortridge*, 99 Cal. 526, 34 Pac. 277 (1893) (order stricken barring newspapers from publishing public testimony in divorce cases); *cf. Ex parte Foster*, 44 Tex.Crim. 423, 71 S.W. 593 (1903) (contempt conviction reversed of a reporter who had published testimony introduced in court.)

It was not until the case of *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697 (1931), that this Court was first directly confronted with a prior restraint against the press. In *Near,* such a restraint was sought against a racist publication as a public nuisance under a state statute permitting injunctions to issue against "malicious, scandalous and defamatory" publications (283 U.S. at 702). This Court, in its decision by Chief Justice Hughes, approvingly repeated Mr. Justice Holmes' statement for the Court quoted above, *id.* at 714, and held the prior restraint unconstitutional.

One passage in Chief Justice Hughes' opinion concedes that the prohibition upon prior restraints need not be viewed as "absolutely unlimited" and goes on to note that the possible exceptions to that prohibition are that during a war the government "might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops" (*id.* at 716).

At least the first of these possible exceptions asserted by Chief Justice Hughes now seems of dubious viability. *See, e.g., Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). The other military hypothetical posed by Chief Justice Hughes was to be considered again by this court in *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), which we discuss shortly. The dictum in *Near,* however, together with language in the *New York Times Co.* litigation, remain the *only* authorities of this Court containing language indicating that prior restraints on the press may ever be upheld. Indeed, so clear was it that the *Near* exception to the flat ban on prior restraint encompassed only the narrowest category of wartime military information, that five years after *Near* was decided, this Court in *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249 (1936), unanimously concluded once again that "by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting *any* form of previous restraint upon printed publications * * *" (emphasis added).

This Court did not come to speak again to the issue of prior restraints on the press until its *New York Times Co.* v. *United States* ruling.[35] That ruling was

[35] In the interim, a variety of state cases had been decided, each holding prior restraints on press coverage of the courts to be unconstitutional. *E.g., Ex parte McCormick,* 129 Tex. Crim. 457, 88 S.W.2d 104 (1935) (order held void barring a reporter from printing testimony introduced in open court); *State* v. *Morrow,* 57 Ohio App. 30, 11 N.E.2d 273 (1937) (order to press not to print names of grand jurors held void); *Ithaca Journal News, Inc.* v. *City Court of Ithaca,* 58 Misc.2d 73, 294 N.Y.S.2d 558 (Sup. Ct. Thompkins County 1968) (order barring newspaper from publishing the names of youthful offenders where the reporter had obtained names prior to the sealing of the information held unlawful).

The final two state cases decided in this area prior to the *New York Times Co.* decision are both analogous to the present case, and again, each held unconstitutional prior restraints on the press. In *Phoenix Newspapers, Inc.* v. *Superior Court,* 101 Ariz. 257, 418 P.2d 594 (Ariz. 1966), a district judge had entered an order directing the press not to publish information introduced at a habeas corpus hearing with respect to a forthcoming murder trial. The Arizona Supreme Court held the order void under the Arizona free press guarantee, observing that "[t]here can be no censor appointed to whom the press must apply for prior permission to publish * * *" (*id.* at 596). And in *State* v. *Sperry,* 79 Wash.2d 69, 483 P.2d 608, *cert. denied,* 404 U.S. 939 (1971), an order of a lower Washington state court holding that the press could not publish information relating to proceedings at a trial unless they occurred in the presence of a judge and jury was held void under the Washington state free press guarantee in a thoughtful opinion by the Supreme Court of that state.

rendered in June 1971. While the Court was divided as to some issues in that case, Chief Justice Burger later confirmed that with respect to the holding of the Court that any prior restraint against the press was presumptively unconstitutional, the Court was unanimous. *See Pittsburgh Press Co.* v. *Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting). It is significant that the Court refused to permit the imposition of the prior restraint despite the facts that the Pentagon Papers were in their entirety classified TOP SECRET—SENSITIVE; that they were obtained in a surreptitious manner; that a majority of the Court indicated that publication of portions of them would be harmful to the nation; and that a majority of the Court indicated that a conviction for violation of the Espionage Act might be sustained for the publication of material contained in the Pentagon Papers.

Thus, the fact that there may be a single narrow exception to an otherwise rigid rule should not allow the courts, as the Nebraska Supreme Court did here, to engage in a balancing of interests, cavalierly carving out exceptions almost as if those made up the rule itself. Quite to the contrary, as this Court made explicitly clear in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975), a ban on the release of news in order to be lawful "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints * * *."

With its ruling in the *New York Times Co.* case, the Court had heard its last prior restraint case involving the press until this one.[36] However, prior to the *New*

[36] We exclude from this listing the Court's ruling in *Pittsburgh Press Co.* v. *Pittsburgh Comm. on Human Relations*, *supra*, which

York Times Co. decision, the Court had given strong indication of its views on precisely the issue before the Court at this time. In *Sheppard* v. *Maxwell*, *supra*—a case we have already discussed at some length—the Court not only had indicated that the courts could not enter any order "that proscribes the press from reporting events that transpire in the courtroom" (384 U.S. at 363), but had also concluded that, in language we have already quoted, the press has a particular duty to subject judicial proceedings—especially in the criminal field—to close scrutiny on behalf of the public (*id.* at 350).[37] This is why the Court has "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for '[w]hat transpires in the court room is public property'" (*id.* at 350; emphasis added; quoting from *Craig* v. *Harney*, *supra*, 331 U.S. at 374).

Sheppard has been consistently understood by lower courts in their decisions as reaffirming the bar on prior restraints against the press in its reporting of judicial proceedings while permitting the courts to take other means to protect aganst the possibility of prejudicial publicity.[38]

---

the majority of the Court held not to constitute a prior restraint case because of the commercial character of the advertisement. The dissenting opinions of Chief Justice Burger and Mr. Justice Stewart concluded that the bars on the press there involved were prior restraints and hence unconstitutional. In the instant case, of course, there is no question about the protected nature of the publications involved.

[37] One example of what the Court was referring to is the reporting of Pulitzer-prize winner Ed Mowery of the New York World-Telegram and Sun, who in 1945 and again in 1952 published stories indicating the innocence of individuals convicted of crimes they had not committed. See, Hochenberg, *The Pulitzer Prize Story*, 128 (1959). Many others could be cited.

[38] For example, *Younger* v. *Smith*, 30 Cal.App.3d 138, 106 Cal.

Despite the weight of these judicial opinions, the Nebraska Supreme Court issued its prior restraint, and purported to base it on a decision of this Court—that in *Branzburg* v. *Hayes, supra*. According to the Nebraska court, dictum in the *Branzburg* opinion to the effect that the press "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal," 408 U.S. at 685, leads to the conclusion that prior restraints on reporting material about pending trials may "under some circumstances" be appropriate. We believe this reading of the Court's language in *Branzburg* as supportive of some prior restraints on the press is untenable.

Rptr. 225 (1973), involved, *inter alia*, a court order that "all agencies of the public media, including written publications, radio, and television, their respective reporters, editors, publishers, and other agents, refrain from the publication of any matter with respect to the present cause except as occur in open court, and particularly as proscribed in the preceding paragraphs of this Order" (106 Cal.Rptr. at 246; emphasis deleted).

The California Court of Appeals held that "the direct restraint against the media was impermissible" (106 Cal.Rptr. at 236). Observing that in *Sheppard*, this Court had considered a case with far more publicity, much of which was openly hostile to the defendant, and that in spite of all the publicity the Court had "brushed aside any consideration" of sanctions against "a recalcitrant press" on the ground that less drastic measures would "guarantee" Sheppard a fair trial, the *Younger* Court ruled unconstitutional the restrictions on publication attempted in that case.

See also *Oliver* v. *Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972); *State ex rel. Miami Herald Pub. Co.* v. *Rose*, 271 So.2d 483 (Fla. App. 2d Dist. 1972); *Sun Co.* v. *Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (4th Dist. 1973); *United States* v. *Dickinson, supra; United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 107 (5th Cir. 1974); *United States* v. *Schiavo, supra; Calley* v. *Callaway, supra; Wood* v. *Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

Branzburg, of course, was not a prior restraint case. Indeed, Mr. Justice White, writing for a majority of the Court, was careful to point to precisely that fact in support of his conclusion that the full testimonial privilege sought by the press in that case should not be granted.[39] More importantly, *all* of Mr. Justice White's relevant language in *Branzburg* related not to prior restraints but to the right asserted by the press under the First Amendment to gather news.[40] Thus, the context of the language quoted by the Nebraska Supreme Court from Mr. Justice White's opinion was the following:

> It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965); *New York Times Co.* v. *United States*, 403 U.S. 713, 728-730 (1971), (Stewart, J., concurring); *Tribune Review Publishing Co.* v. *Thomas*, 254 F.2d 883, 885 (CA3 1958); *In the Matter of United Press Assns.* v. *Valente*, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In *Zemel* v. *Rusk, supra*, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "render[ed] less than wholly free the flow of information concerning that country." *Id.*, at 16. The ban on travel was held constitutional, for "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.*, at 17.

---

[39] "But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold" (408 U.S. at 681).

[40] *See, e.g.*, Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U.Pa.L.Rev. 166 (1975).

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.*, at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.*, at 361. See also *Estes* v. *Texas*, 381 U.S. 532, 539-540 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963).

> It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. [408 U.S. at 684-685; footnotes deleted.]

We submit that it is a misreading of the opinion of the Court in *Branzburg* to conclude that it supports, even in dicta, the entry of prior restraints against the

press. A far plainer reading, we submit, is that a press denied access to a narrow category of court proceedings cannot, therefore, report about those proceedings. Indeed, if there were any doubt about that interpretation of the opinion, we believe it was resolved in Mr. Justice White's concurrence in *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), where he wrote the following in a concurring opinion:

> According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills* v. *Alabama*, 384 U.S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. [418 U.S. at 259; footnote deleted.]

We believe it inconceivable that the *Branzburg* opinion was intended to support, without benefit of a single citation to a prior restraint decision or a discussion of the long unbroken history of reversals of such restraints, the lowering of the "virtually insurmountable

barrier" referred to in *Tornillo*.[41] And if *Branzburg* is to be read as it was by the Nebraska Supreme Court, then we submit it is inconsistent with the body of prior restraint case law previously established in this Court and that its dictum should be overruled.[42]

We submit, therefore, that the Nebraska decision not only ignores this Court's ruling in *Sheppard* and misreads the majority decision of the Court in *Branzburg*, but misapprehends the prior restraint and more general First Amendment law established by this Court.

A dichotomy is set forth in the decision under review between speech to be protected against prior restraints and speech as to which prior restraints may be entered after the application by the courts of a balancing process. As summarized in the Nebraska ruling:

---

[41] The Fifth Circuit also believes that this Court could not possibly have meant literally the referred-to language in *Branzburg*. See *United States* v. *Dickinson*, *supra*, 465 F.2d at 507 n. 14.

[42] Nor is there any support for the issuance by the Nebraska Supreme Court of its prior restraints in the two recent rulings by this Court on the stay motions heard by it. In *Times-Picayune Pub. Corp.* v. *Schulingkamp*, *supra*, Mr. Justice Powell as Circuit Justice granted a stay of an order barring the press from publishing information similar to that prohibited by the order before this Court. And *Newspapers, Inc.* v. *Blackwell*, No. A-981, stay denied June 2, 1975, involved a restrictive order preventing the publication of the names of jurors selected to serve on a panel which was to be in force during the trial itself. Although the order there was apparently a clear violation of the principles of *Cox Broadcasting Corp.* v. *Cohn*, *supra*, and the prior restraint cases discussed herein, this Court, having been informed by an *amicus* that the trial might terminate within two days of the time the stay application was actually denied, declined to grant the stay. (Mr. Justice Brennan and Mr. Justice White would have granted the stay; the Chief Justice and Mr. Justice Douglas did not participate).

> That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. *Near* v. *Minnesota, supra.* [Cert A 61a.]

In other situations, however, the Nebraska court urges an "accommodation" between allegedly conflicting constitutional imperatives and a resolution of that accommodation by the imposition of prior restraints on the press. These other situations are defined as follows:

> In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, then an accommodation of some sort must be reached. It is difficult to accept the relators' position that press in such cases must be completely unrestrained even if the cost is that a criminal cannot be tried. It is also difficult to accept the proposition that an accused may not be irreparably harmed by wrongdoing incarceration. *Sheppard* v. *Maxwell, supra,* is a case in point. [Id.]

The legal discussion in the Nebraska ruling that follows simply cannot withstand analysis. For one thing, the *Sheppard* decision is itself clear that, contrary to the views expressed in the Nebraska decision, it was *not* the press that caused the ten-year improper incarceration of a defendant; it was the failure of the trial judge to take the steps described by Mr. Justice Clark which would have protected the defendant's right to a fair trial, even in that most sensational case. And, more specifically, the reversal of *Sheppard* was

not occasioned by the failure of the trial judge to place any direct limitations on the freedom traditionally exercised by the news media. That, in fact, is what he was told he could not do (384 U.S. at 356).

More broadly, the Nebraska ruling assumes—and assumes wrongly—the answer to the critical question with respect to *who* shall decide when and whether confessions and the like shall be published. According to the Nebraska decision, the judiciary is to apply different degrees of "values" in weighing with respect to "each and every exercise of freedom of the press" —that is, to consider the racist speech in *Near* [43] more protected that the accurate recitation of facts about a public preliminary hearing, as in this case.

But this Court has consistently ruled otherwise. It has forsaken any power in the courts to make precisely such decisions, holding that it is the press that must decide what to print and how to weigh the sometimes awesome competing claims of silence and exposure. As stated by Chief Justice Burger for the Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124-125 (1973):

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt * * *. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new: the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

[43] See 283 U.S. at 724-726.

Again, in *Miami Herald Pub. Co.* v. *Tornillo, supra,* Chief Justice Burger stated for the Court:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair —constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. [418 U.S. at 258.]

To rule otherwise would place the courts in the intolerable position of weighing the social value of one type of news story against another—and, indeed, one confession against another. One need only contemplate the judicial decision-making process as to whether a confession of Sirhan Sirhan or Charles Manson or a defendant in one of the Watergate trials could be published—and how to "balance" the public's interest in reading the confession against that of the defendant. Under the First Amendment, such decisions are simply not the judiciary's to make.

To be sure, the Nebraska ruling may be read as not requiring any such judicial balancing, but only the resolution by the courts of the question of whether the publication of a confession or other "information sharply implicative" of the guilt of the accused "might make it difficult or impossible for the State of Nebraska to afford Simants a trial before an impartial jury * * *" (Cert A 59a). If this is the reading intended, however, then the publication of any confession and any "information strongly implicative of guilt" may be enjoined —no matter how newsworthy it may be.

Under this approach, the publication of the confession to a crime of a sitting public official might be enjoined;" as might the confession of a Manson-style mass murderer; or, indeed, the confession of an alleged presidential assassin. So sweeping is the ban on publication that the investigative journalism that exposed the corruption of the Tweed Ring in Tammany Hall, the abuses of governmental power in the Credit Mobilier scandal and, of course, much of the Watergate scandal all could be barred—in the name of avoiding publication of "information strongly implicative of guilt * * *." [45]

We know that we need not remind this Court of the *reasons* why an American free press is even more vital in today's world than it was when Jefferson said, "Where the press is free, and every man able to read, all is safe." [45A] One need only scan the daily papers to be made continually aware of the inroads upon freedom of the press now underway in so many parts of

[44] Here again, Judge Murray's admonition in *United States* v. *Mandel*, *supra*, is instructive. In denying a prior restraint on witnesses, he said:

> The Court is also sensitive to the fact that the public has an overriding interest in seeing that justice is fairly administered. This interest is unquestionably heightened when, as in this case, charges have been brought against the Governor of the state, and where allegations have been made by the Governor that the prosecution is politically motivated. [Slip. op. 9.]

[45] Pulitzer prize winning journalism included in the net cast by the Nebraska ruling would encompass such exposes as the Boston Post's articles on the illegal operations of Charles Ponzi in 1920, the New York Sun's expose of criminals in power on the New York waterfront in 1947, and the Chicago Daily News' unmasking of State Auditor Orville E. Hodge as a thief in 1956. See Hohenberg, *The Pulitzer Prize Story*, *supra*, 66, 116, 336.

[45A] Letter to Charles Yancey, Jan. 6, 1816, 10 The Writings of Thomas Jefferson 4 (P. Ford ed. 1899).

the world. Suppression, censorship, and governmental control in various forms are not the sole province of countries which have traditionally regarded the press as an arm of government.[46] As noted by Mr. Peter Galliner, Director of the International Press Institute of Zurich, Switzerland, significant inroads upon free communication have recently been made in India, Bangladesh, Nigeria, Portugal, Zambia, South Korea and the larger Latin American countries.[47] In Spain, publications have been seized and journalists arrested; in Italy, legislation has placed penalties upon revealing secret police investigations; on Malta, the Prime Minister has gained control of virtually all the media, and in Portugal, two editors have ben detained, one daily newspaper suspended, and a radio station occupied (*id.*). The sad tales in India and the Philippines are too well known to bear repetition.[48]

[46] At a recent Intergovernmental Meeting of Experts to Prepare a Draft Declaration on Fundamental Principles Governing the Role of the Mass Media in Strengthening Peace and International Understanding and in Combatting War Propaganda, Racism and Apartheid, held in Paris on December 15-22, 1975, the Soviet Union proposed the following article to be included in the declaration:

> States shall bear responsibility for the activities of the mass media in territories under their jurisdiction, in accordance with international law.

In addition, Mongolia proposed the following article:

> States are responsible for the activities in the international sphere of all mass media under their jurisdiction.

The article proposed by Mongolia was actually adopted as Article XII of the Draft Declaration by a vote of 19 for and 12 against, with eight recorded abstentions. This occurred at a time when a number of nations, including the European nine, the United States, Canada and Australia were voluntarily absent from the meeting. There were between 50 and 60 nations initially participating.

[47] See Editor & Publisher, December 27, 1975, p. 10.

[48] One aspect of prior restraint orders—that they so often fail to

Chief Justice Burger said it all in an interview last summer videotaped by the United States Information Agency. He pointed out that one of the first steps taken by a person or group attempting to seize power in a country is "to put a limit on freedom of expression, a limit on a free press." 61 A.B.A. Journ. 1352 (November 1975). We do not imply for a moment that any court in this country would consciously be part of any such effort. We do point out that once a branch of government—in this case, the judiciary—has found reasons for telling the press, on pain of criminal contempt, what it can and cannot publish, we have started down that long and dismal road where it becomes easier and easier to discover reasons why news should not reach the public—at least for a while.

Today it is a confession. Tomorrow it is the indictment of a public official just prior to an election. And soon the whole concept has changed, and the people learn what government wants them to learn.

That is why this Court in this case, at the threshhold of a whole new controversy over prior restraints, has such a unique opportunity to stop in its tracks what

---

accomplish their intended purpose or are even self-defeating—is illustrated by the situation in India. A news dispatch from New Delhi dated January 15, 1976, noted that "In today's India, with all the regular information media now controlled by the Government, the rumor has become a conversational staple • • •. Prime Minister Indira Gandhi says that one of the reasons for the censorship that her Government imposed last June was to end the spread of 'vicious rumors.' • • • But some Indians think that rumors have an even more central role now than they had before the strict new political order was imposed." N.Y. Times, Jan. 18, 1976, Sect. I, at 12. Similarly, news of the imposition of "gag" orders, particularly in small communities, can frequently cause residents to draw more damaging conclusions about a defendant and his past than would be warranted by the actual facts.

could become a trend so tragically detrimental to the very first Amendment to our American Constitution.

III.

This Record Will Not Support a Prior Restraint Order

Petitioners respectfully submit that no matter what criteria, formulae or standards are applied in this case, the prior restraint order entered by the Nebraska Supreme Court cannot be upheld. The record in this case simply will not support the entry of such a prior prohibition against the publication of news.

The order under review here is the one entered on December 1 by the Nebraska Supreme Court.[49] That court, of course, could base its order only on the record before it. That record has been summarized in our Statement of the Case. As shown there, only one "evidentiary" hearing has been held in the entire chronicle of events that has led to the present prior restraint. In other words, there has been only one instance in which any "evidence" of any kind has been inserted into the record. That was at the October 23 hearing before the District Court.

The "evidence" at that hearing consisted in essence of the identification of docket entries in the *Simants* case, the receipt of thirteen news articles, and Judge

---

[49] Despite the importance of the constitutional issues in this case and the serious impact of the order upon Petitioners' ability to transmit information to the public, the reasoning supporting the restraints imposed by the Nebraska Supreme Court was stated by only a minority of that court. Chief Justice White and Justice Clinton dissented on jurisdictional grounds and never reached the merits (Cert A 66a). Justices Spencer and Newton joined the majority solely to resolve the dispute but said they agreed with the dissenters (Cert A 69a).

Ruff's testimony that he had seen three or four of those articles; that he was generally aware of national press attention, including radio and television publicity; that unidentified members of his court had spoken to him about the matter; and that his "main criteria" consisted of "[c]onversation around the courthouse," *i.e.*, from unidentified counsel—none of which information had been made part of any record before him prior to the entry of his own order.

Several points should immediately be noted.

First, the District Court itself apparently did not rely on any of the above "evidence" in issuing its October 27 order. This order stated that "because of the nature of the crimes charged in the complaint," pre-trial publicity "could" impinge upon Simants' right to a fair trial (Cert A 9a). Such a standard presumably would warrant prior restraints in each and every case of multiple crimes, crimes involving sex or perversion and crimes involving prominent persons. In fact, where crimes are in any way different from the ordinary, day-to-day, "police blotter" crimes that plague all of our towns and cities, this standard would appear to allow for blanket restraints on the press. It is, in essence, no standard at all—certainly not in any constitutional sense. If, somehow, "the nature of the crimes charged" were the test, and the District Court meant to imply that some crimes, by their very nature, generate more interest and publicity than others, certainly the earliest victim of such a standard would be crimes involving well-known political figures. Under such a standard, for example, there would have been no coverage of Watergate prior to trial.

But we need not press the point, because the Nebraska Supreme Court, while adopting the District Court's

conclusion that there was a "clear and present danger," apparently rejected the District Court's total reliance upon the nature of the crimes [50] and instead sought actual evidence in the record to support this conclusion and its own amended order.[51] It purported to find such evidence in news articles introduced as Exhibits 4G, 4N and 4M (which was the same as 4B) and in population figures for the area involved.

We note, first, that two out of three articles relied upon by the Nebraska Supreme Court (Cert A 59a) were different from those relied on by the County Court, and that all three were apparently ignored by the District Court. Secondly, a review of the three articles reveals that they were all the result of ordinary, factual reporting on a matter of intense local interest —nothing more and nothing less. Moreover, the articles performed an extremely important public-interest function. Immediately after the murders, the press, in full cooperation with the authorities, alerted the community to the possible dangers of other attacks. When Simants was taken into custody, news of the arrest of a suspect helped not only to allay the fears of local residents but to diffuse a potentially dangerous situation, in view of the rumors of snipers and the presence of loaded guns.

Thirdly, to convert three straight news articles—or even all thirteen of the articles before the District

---

[50] "The mere heinousness or enormity of a crime is, of course, by itself, no reason at all for a prior restraint of freedom of the press, but certainly it is a matter which a court may take into consideration along with all the other factors involved" (Cert A 61a).

[51] "Does the evidence in the court below support the Court's finding so as to overcome the heavy presumption of unconstitutionality of the prior restraint?" (Cert A 56a.)

Court—into an excuse for a prior restraint on the press is to turn the First Amendment on its head; this type of reporting was supposed to be encouraged and protected, not silenced, by the First Amendment. Finally, one of the three articles was from a newspaper published 200 miles from the planned site of the trial, and another was from a newspaper published 250 miles from the site and in a different state. To assume that despite all the protections accorded jurors under *Sheppard,* these three articles could somehow prevent a defendant from receiving a fair trial is simply to blink reality and to conclude that *all* publicity about crimes is destructive of fair-trial protections and must be suppressed.

As to the other factor apparently relied upon by the Nebraska Supreme Court—the population of the area—we submit that even if the potential jurors were all selected from the counties listed by the Nebraska Supreme Court, it is absurd to argue, on the basis of the publicity in this case, that a prior restraint on the publication of news can be sustained because twelve persons who had "not already made up their minds as to the defendant's guilt or innocence" (Cert A 56a) might not be found from among 82,000 inhabitants. This is particularly true in light of the recent findings, referred to previously, that jurors need not be totally free from all knowledge of a case and that the effect of news publicity may well be minimal.

As for the "finding" of clear and present danger made by the District Court (Cert A 9a) and apparently adopted by the Nebraska Supreme Court (Cert A 56a), careful attention should be paid as to how it

evolved and on what it was based.[52] The original application by the County Attorney for a prior restraint order made no mention of such a clear and present danger. It argued only that there was "a *reasonable likelihood* of prejudicial news which would make *difficult, if not impossible,* the impaneling of an impartial jury" (emphasis added). The County Court also made no reference to a clear and present danger; it adopted the same "reasonable likelihood" standard proposed by the County Attorney (Cert A 1a). The District Court was the first to refer to a clear and present danger, but it did so solely on the basis of the nature of the crimes committed, and even then it found only that there was a danger that pre-trial publicity "could" impinge upon the defendant's right to a fair trial (Cert A 9a). Finally, the Nebraska Supreme Court, solely on the basis of the record before the District Court plus population figures—all of which we have already analyzed—simply concluded that there was a sufficient basis for the finding of a clear and present danger. Throughout the majority opinion there are references to rights that "could" be substantially impaired (Cert A 56a) or "may" be impaired (*id.*), to evidence that "rather clearly indicate[s]" the necessity to protect the accused (*id.*), to publicity that "might" make it difficult or impossible to obtain an impartial jury (*id.* at 59a), to cases like this one which make it "much more difficult" to obtain an impartial jury (*id.* at 60a), and to the supposition that cases "are likely to occur" in which criminals go free or

[52] Such a finding, of course, is no magic talisman. This Court must itself weigh the underlying facts to determine whether the requisite standard—whatever that may be—has been met. *E.g., Pennekamp* v. *Florida,* 328 U.S. 331, 335, 336, 346 (1946); *Wood* v. *Georgia,* 370 U.S. 375, 385-389 (1962).

innocent persons are convicted unless prior restraints are entered (*id.* at 62a).

We respectfully submit that no matter what standard is applied by this Court to prior restraints on the reporting of judicial proceedings, that standard could not possibly be said to find a proper evidentiary basis in this record. Prior restraints could not, even under the most lenient view of their utility and constitutionality, be grounded upon what could happen or what might happen or how difficult the trial court's job might become without them—or upon "[c]onversation around the courthouse" overheard by some judge.

We turn, then, to two additional and bizarre aspects of the particular prior restraint which binds Petitioners.

First, the Nebraska Supreme Court observed that if Petitioners had not contested the prior restraint order by submitting themselves to the jurisdiction of the District Court, they "could have ignored the [prior restraint] order" (Cert A 58a). In other words, the District Court had no power to bind those who were not served or otherwise placed under its direct jurisdiction. Whether this conclusion was correct or not, it imposes, of course, a terrible penalty upon those attempting to take all appropriate steps to protect the constitutional rights of the public as well as the media. More importantly for present purposes, however, the Nebraska Supreme Court's conclusion has resulted in Petitioners being subjected to prior restraints which were never applicable to any other media in the State of Nebraska or elsewhere (Cert A 49a, 64a). In other words, Petitioners' competitors could and did print and publish the very items of information which Petitioners could not. The result is thus not only inequitable but self-defeating, since even under the broadest interpretation of the Nebraska Supreme Court's order, potential jurors could see and hear on national television or read in other newspapers and news magazines what they could not read in Petitioners' newspapers or hear on Petitioners' radio programs.

Secondly, among the facts which the Nebraska Supreme Court forbade Petitioners from publishing was any "information strongly implicative of the accused as the perpetrator of the slayings" (Cert A 64a). Such a restraint, which could apply to any fact from the suspect's arrest to his hiring of a criminal attorney, is totally incapable of logical interpretation and application. We submit it is void on its face.

The conclusion seems inevitable that even if the Court were now to be less firm in its resistance to prior restraints than it has ever been in the past—an attitude which we strongly urge the Court to reject—the particular restraint in *this* case could not possibly be upheld. It is based upon such complete generalizations, so flimsy a record, and so shifting a standard; it is so inequitable in its application, and it is so self-defeating in terms of what it seeks to accomplish, that under no circumstances could it be made the basis of the suppression of free speech and press.

CONCLUSION

We respectfully submit that the trial judge in this case had a full panoply of methods available to him to protect Mr. Simants from the possibly harmful effects of prejudicial publicity—harmful effects, incidentally, which have certainly never been shown to

exist on this record. The trial judge, now upheld by the Nebraska Supreme Court, chose instead to prevent the press from publishing certain information. As a result, the free flow of information to the public stopped, and the discussion of what and when to publish passed from a free press to a branch of government, the judiciary. That result, we submit, was a direct violation of the First Amendment. We urge the Court to reassert its prior decisions and to rule without equivocation that under circumstances such as those posed in this case, no direct prior restraint on the press is constitutionally permissible.

Respectfully submitted,

E. Barrett Prettyman, Jr.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

James L. Koley
Stephen T. McGill
McGill, Koley & Parsonage, P.C.
Suite 300
10010 Regency Circle
Omaha, Nebraska 68114

Attorneys for Petitioners